(2)

No. 91-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NEWPORT LIMITED, a Partnership in Commendam,
Petitioner,

v.

SEARS, ROEBUCK AND CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent believes no question deserving the Court's attention is presented by petitioner's brief; however, petitioner's phrasing in the "Question Presented" section of its brief is incorrect in that it fails to mention the extreme amount of judicial and private resources and time devoted to this matter in the district court, misleadingly states that the law governing "certain" of its state law claims is unsettled, and improperly ignores the discretionary nature of the exercise of pendent jurisdiction, which the Fifth Circuit correctly found was abused here.

LIST OF PARTIES

The parties are listed in the caption. The nonwholly owned subsidiaries of respondent, Sears, Roebuck and Co., are:

Sears Canada Inc.

Sears, Roebuck de Mexico, S.A.

Sears, Roebuck Pty. Limited (Australia)

Prodigy Services

Tires Plus Cl.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Sears, Roebuck and Co. ("Sears") opposes the petition of Newport Limited, A Partnership in Commendam ("Newport"), for a writ of certiorari. The United States Court of Appeals for the Fifth Circuit correctly found that the district court had abused its discretion in failing, on the eve of trial, to exercise pendent jurisdiction over Newport's state law claims after four years of vigorous litigation resulting in 23 volumes and thousands of pages of record, a pre-trial order exceeding

200 pages, over a hundred depositions, and nearly two hundred thousand pages of discovery production. *Newport Limited v. Sears, Roebuck and Co.*, 941 F.2d 302, 307, *reh'g denied*, 946 F.2d 893 (5th Cir. 1991).

Newport now seeks to have the Court review the Fifth Circuit's fact-specific ruling by erroneously contending that the Fifth Circuit's decision conflicts with the principles underlying *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), and with decisions of other circuits. To the contrary, the Fifth Circuit properly applied the principles enunciated by this Court in *Gibbs* and its progeny, and the Fifth Circuit's ruling does not conflict with rulings of any other circuits Newport can identify. In reality, Newport is seeking to enlist the aid of the Court in furtherance of Newport's forum shopping and recently-acquired preference to have a state court decide its claims.

Newport's current claim that the Fifth Circuit "has deprived Newport of the opportunity to have Newport's state law claims decided by a state court", Newport's Petition at 6, contrasts sharply with Newport's conduct during the first four years of this litigation. Newport first chose *federal court* as its forum to decide its initial complaint of exclusively state law claims, and amended its complaint three times with only state law claims. Newport never showed any concern about the district court's deciding its state law claims until after the district court decision dismissing the later-added RICO claim on its merits and expressing doubts about the rest of Newport's claims.[1]

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[1] Among the district court's findings that apparently give Newport pause about continuing in federal court are that there was "an inherent inconsistency" in Newport's allegations, that Newport's damages allegations were "woefully lacking" and ". . . at best, speculative and based on assumed facts finding no support in the record", and that "Newport's disregard of orders and deliberate

Sears respectfully submits that Newport's petition asserts nonexistent conflicts among the circuits, seeks improperly to further Newport's forum manipulation and should be summarily denied.

STATEMENT OF THE CASE

1. Additional Information on the "Jurisdictional Dispute"

Newport's statement of "the jurisdictional dispute" is incomplete and requires amplification on several points. For example, Newport states that it "immediately instituted" state court proceedings once the district court had dismissed the federal lawsuit. Newport's Petition at 4. Newport, however, neglects to mention that it intentionally withheld service of the state court suit on Sears for over four months. Newport also distorts the import of the state court's order on the use in state court of discovery from the federal proceedings by alleging that the order will "avoid undue expense and duplication of effort." Due to the state court's refusal, at Newport's request, to include the district court's discovery orders, however, numerous limitations imposed by the district court to prevent repetitious and harassing discovery by Newport have been ignored in the state court proceedings and have already caused wasteful and needless redundant litigation.

The one step taken by the state court that removed the threat of duplication and waste of judicial and private resources was to stay proceedings there on October 22, 1991 during the pendency of the litigation in the district court. Newport also neglects to mention that the Fifth Circuit took the unusual step of issuing its mandate the day after oral argument in July of 1991. 1a.[2]

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refusal to specify its claims and the facts upon which it relies [was] pure contumacy." *Newport Limited v. Sears, Roebuck and Co.*, 739 F. Supp. 1078, 1079 n.2 (E.D. La. 1990).

[2] Immediate issuance of a mandate signifies a circuit's opinion that it "would not change its decision upon rehearing, much less

2. More on the Underlying Litigation

Although Sears agrees that the facts out of which this litigation grew are not technically germane to the petition before this Court, Sears must rectify some of Newport's innuendos intended to invoke unwarranted sympathy.

First, Newport characterizes the letter it provided to Sears in support of Newport's Urban Development Action Grant application as a "binding agreement," a "fact" Sears strenuously disputes and which is belied by the letter's own terms. Newport's Petition at 5. The district court concluded that this letter indicated that "any contemplated association between the parties was in the future, after the preparation of mutually acceptable legal documentation." *Newport Limited v. Sears, Roebuck and Co.*, 739 F. Supp. 1078, 1082 (E.D. La. 1990). The Fifth Circuit referred to the same letter as showing that "the parties agreed to agree." *Newport*, 941 F.2d at 303.

Newport also states as settled "fact" that Sears later decided it did not need a new warehouse at Newport's location and "decided not to advise Newport." Newport's Petition at 5. Sears never decided not to proceed with the lease transaction it was negotiating with Newport, and the district court stated that "Newport admits that it was informed . . . that Sears was not interested in additional warehouse space." *Newport*, 739 F. Supp. at 1083. Newport also alleges at page 5 of its petition that Sears opted to "engage in a pattern of misrepresentations," allegations which Sears denies and which the district court deemed "deficient." *Id.*

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hear the case *en banc*", and that "there is no reasonable likelihood that the Supreme Court would grant review." *Johnson v. Bechtel Associates Professional Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986); *Ostrer v. United States*, 584 F.2d 594, 598 (2d Cir. 1978). The immediate issuance of mandate is a further indication of the strength of the Fifth Circuit's belief that the district court abused its discretion.

Newport's statement at page 5 of its petition that it "continued construction" after Sears allegedly changed its mind is misleading in that the minimal ground-preparation work performed by Newport antedated its discussions with Sears. And Newport's allegation at page 6 that Sears did not provide construction information is refuted by the testimony of Newport's own construction consultant and documents showing Newport had sufficient information to initiate construction, although it chose not to.

Finally, Newport's claim at page 6 that it incurred millions of dollars of damages as a result of Sears' actions and inactions was described as "at best, speculative and based on assumed facts finding no support in the record" by the district court. *Newport*, 739 F. Supp. at 1082-83. Newport also fails to mention that its bankruptcy proceeding was dismissed after a consensual settlement with its major secured creditor.

SUMMARY OF ARGUMENT

The Fifth Circuit's decision that the district court had abused its discretion in not exercising pendent jurisdiction is proper under *Gibbs* and its progeny and does not create a conflict with any other circuits. The *Gibbs* factors of judicial economy, convenience, fairness, and comity weigh overwhelmingly heavily in favor of the exercise of pendent jurisdiction under this case's specific facts. Newport ignores the fact that where there is discretion it can be abused, and can point to no genuine conflict with any other circuits. The Fifth Circuit's decision was proper and no need for a writ of certiorari exists here.

REASONS FOR DENYING THE WRIT

I. THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH GIBBS AND ITS PROGENY

Notwithstanding Newport's twisted view of pendent jurisdiction, the Fifth Circuit's analysis and decision is entirely consistent with the standards set by this Court. The Fifth Circuit was fully cognizant of, and in fact applied, in its decision the *Gibbs* factors of judicial economy, convenience, fairness, and comity. *Newport*, 941 F.2d at 307-08. The Fifth Circuit also acknowledged this Court's admonition in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988), that *Gibbs* did not establish a "mandatory rule to be applied inflexibly in all cases." *Newport*, 941 F.2d at 307, citing *Carnegie-Mellon*, 484 U.S. at 350 n.7.

This Court has noted that where a court has the power to exercise pendent jurisdiction and the advantages of economy, convenience, and fairness are present, *Gibbs* does not simply permit but actually "contemplates" that the district court adjudicate the pendent claims. *Hagans v. Lavine*, 415 U.S. 528, 545 (1974). The Fifth Circuit has even recognized that "it is unusual for a court to decline to exercise that power where it exists." *Jackson v. Stinchcomb*, 635 F.2d 462, 472 (5th Cir. 1981).

A brief review of the procedural facts in this case confirms the correctness of the Fifth Circuit's holding that the *Gibbs* factors—judicial economy, convenience, fairness, and comity—are not offended by the exercise of pendent jurisdiction but "counsel strongly" in favor of retention of pendent jurisdiction. *Newport*, 941 F.2d at 308. Such a review also demonstrates the fact-specific nature of this case and its unsuitability as a "vehicle" to resolve Newport's imagined conflict among the circuits. Newport's Petition at 8.

Newport chose to file a complaint consisting of strictly state law claims with the district court in June of 1986

with jurisdiction predicated on diversity. Newport then filed three amendments to its complaint involving only state law claims. On the last day for amendments, October 2, 1988, Newport filed a fourth amended complaint adding a seventh cause of action based on 18 U.S.C. § 1961 *et seq.* (RICO).

During the course of this case the district court invested "hundreds of Court hours devoted to routine pretrial matters," *Newport*, 739 F. Supp. at 1083; four trial dates were assigned and continued; two stays of proceedings were entered; Newport amended its complaint four times, alleging seven causes of action arising out of the same facts; 157 depositions in 24 cities in 12 states were conducted; hundreds of pages were provided in response to interrogatories;[3] 211,495 documents were produced in discovery, including 63,000 by third parties; fourteen motions to compel and for protective orders were filed; three protective orders were entered along with a confidentiality order and the striking of privileged documents; two motions for summary judgment and a motion to dismiss were also filed comprising 396 pages of supporting and opposing memoranda and 159 exhibits; discovery was completed and the discovery deadline passed prior to dismissal; and a 208-page pretrial order listing 89 witnesses and 872 trial exhibits was submitted. The investment of judicial resources by the district court and the parties has been enormous. Without the exercise of pendent jurisdiction, that investment would have been wasted and substan-

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[3] For example, "[o]n the eve of trial after years of difficult discovery, Sears filed a motion to compel aimed at the discovery of the most rudimentary facts concerning the plaintiff's case. . . . After being provided with literally hundreds of pages of responses, the Magistrate twice ordered Newport to revise its responses in a coherent and specific manner. . . . Again, over a hundred pages of answers and responses replete with cross-references were provided." *Newport*, 739 F. Supp. at 1083.

tial additional resources of the state court and the parties would be expended.[4]

Newport has misleadingly alleged that the state court "has prevented any duplication" of judicial resources by making available discovery from the federal proceeding. The state court's order, however, allows use of only the results of discovery and not of the attendant orders. This omission alone will cause, and already has occasioned, a tremendous and pointless duplication of effort by the state court and the parties. The district court had entered a number of discovery orders which, for example, prevented Newport from redeposing some Sears' witnesses a third or fourth time. Since the district court's orders were not recognized by the state court, Newport immediately attempted to redepose various Sears' witnesses for a third or fourth time, a move which Sears opposed. Sears' opposition resulted in the filing of numerous pleadings and a hearing before the state court, measures nearly identical to ones taken three years earlier by the parties and the district court. This is but one example of the duplication of effort by the state court and the parties.[5]

Another glaring example of waste of judicial and private resources is the issue of certain of Sears' privileged documents. The district court found that certain documents in Newport's possession were still protected by Sears' privilege and ordered them stricken from certain pleadings. Since Newport did not view itself as bound

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[4] This is particularly true since at the time of the district court's dismissal, Sears' motion for summary judgment had been fully briefed and awaited ruling by the district court, which if granted would have disposed of some or all of the issues to be tried.

[5] Another example was Newport's serving new sets of interrogatories and production requests to Sears in state court, which would have been barred in federal court in view of the discovery cut off in that forum. Newport served such written discovery in April 1991 despite having represented at least two years earlier that it was ready for trial.

by that determination in state court, it again attempted to use the documents in that action. This in turn resulted in another round of duplicative motions and hearings before the state court, constituting needless expense of judicial and private resources. Newport's gamesmanship in this regard was not only an inconvenience to the state court, but also highly unfair to Sears which had expended substantial resources on this very issue in the district court over two years ago, only to have to re-expend resources on the same issue in state court.

Not only has the district court made a substantial investment in the case, but as a result of its four-plus years' involvement, it is intimately familiar with the facts alleged in the state law claims (these same facts allegedly supported the late-added and short-lived RICO claim) and with the behavior of Newport throughout the "strained" litigation. *Newport*, 739 F. Supp. at 1083. The district court observed "an inherent inconsistency in Newport's allegations," that [Newport's] damages allegations were "woefully lacking," that Newport "repeatedly refused to specify its damages," that "Newport's refusal to specify its claims of fraud . . . also has been continuous and blatant", and that Newport's refusal to specify its claims and alleged facts was "pure contumacy" warranting "imposition of the most severe sanctions." *Id.* at 1079 n.2, 1082-83.

It is patently unfair to Sears for Newport to be allowed to wipe the slate clean and start all over again in state court, particularly when Newport chose to file its all state law complaint in district court and decided it preferred state court only *after* the district court had rendered its scathing opinion. In a rare moment of candor, Newport admitted at oral argument before the Fifth Circuit that it viewed the district court as a "hostile forum." Newport offers no authority to support its anomalous posture of avoiding the district court's jurisdiction after actively seeking it for four years, initially

for purely state law claims only. To the contrary, this Court has recognized that forum manipulation concerns are legitimate and serious, and are relevant to a determination whether pendent jurisdiction should be exercised. *Carnegie-Mellon*, 484 U.S. at 356 n.12.

Newport now attempts to argue that it wants a "surer-footed reading of applicable law" from a Louisiana state court, disparaging the Fifth Circuit's well-founded statement that Newport's claims "present no novel or especially unusual questions which cannot be readily and routinely resolved by the court *a quo*." *Newport*, 941 F.2d at 308. Newport incorrectly argues at page 12 of its petition that "the Fifth Circuit had no basis for even considering the state law claims," ignoring the fact that in Sears' appeal it had asked the Fifth Circuit to decide Sears' pending motion for summary judgment on the state law claims as had been done in *Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d 1295 (5th Cir. 1983); *Hudak v. Economic Research Analysts, Inc.*, 499 F.2d 996 (5th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975); and *Parrent v. Midwest Rug Mills, Inc.*, 455 F.2d 123 (7th Cir. 1972). Sears discussed the state law claims fully in its brief and the Fifth Circuit had the entire lengthy record before it. It is disingenuous for Newport to state to this Court that the Fifth Circuit had no basis to evaluate the state law claims as routine and, interestingly, Newport *never* attempts to show that its claims involve unsettled state law. By choosing to file its suit in federal court, Newport acknowledged that its claims are the type of ordinary commercial claims which the district courts sitting in the state routinely decide under Louisiana law. *See, e.g., Myers v. First City Bank*, No. 86-3393 (E.D. La. 1988) (detrimental reliance); *In Re Ward*, 894 F.2d 771 (5th Cir. 1990) (negligent misrepresentation); *Brill v. Catfish Shaks of America, Inc.*, 727 F. Supp. 1035 (E.D. La. 1989) (unfair trade practices and breach of implied covenant of good faith and fair dealing under Louisiana Civil Code); *Morris v.*

Homco International, Inc., 853 F.2d 337 (5th Cir. 1988) (breach of contract and resulting damages); *Acme Refrigeration of Baton Rouge, Inc. v. Whirlpool*, 785 F.2d 1240 (5th Cir. 1986), *cert. denied*, 479 U.S. 848 (1986) (fraudulent misrepresentation).

The cases cited by Newport as indicating a federal court should avoid deciding *unsettled* issues of state law involve peculiarly local concerns, unlike those present here. *See, e.g., Kidder, Peabody & Co. v. Maxus Energy Corp.*, 925 F.2d 556, 564 (2d Cir. 1991), *cert. denied*, 59 USLW 3837 (1991) (whether a federal ruling applied to Texas state law of damages); *Dezell v. Day Island Yacht Club*, 796 F.2d 324, 329 (9th Cir. 1986) ("sensitive issue" of social policy occasioned by antidiscrimination law); *Grano v. Barry*, 733 F.2d 164, 169 (D.C. Cir. 1984) (local governmental process); and *Shaffer v. Board of School Directors*, 730 F.2d 910, 913 (3d Cir. 1984) (public education policy question of first impression). None of Newport's commercial claims approximates these uniquely local questions.

Finally, Newport can point to no instance of unfairness or inconvenience to it by proceeding in the forum of its first choice, whereas Sears has cited just some of the compelling examples of unfairness and inconvenience it has been and would continue to be required to undergo in wasteful, expensive, and redundant litigation in state court. Clearly, none of the *Gibbs* factors—judicial economy, convenience, fairness, and comity—weighs in Newport's favor and it was this readily evident tipping of the scales which "compelled" the Fifth Circuit to find an abuse of discretion, "hesitant though" it was to do so. *Newport*, 941 F.2d at 308.

II. THE FIFTH CIRCUIT'S DECISION DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS

Newport incorrectly asserts that the Fifth Circuit's decision creates a conflict among the circuits. Newport too facilely ignores a fundamental precept of pendent

jurisdiction: it is a doctrine of discretion and its application is reviewed for an abuse of discretion. *Gibbs*, 383 U.S. at 726; *Rosado v. Wyman*, 397 U.S. 397, 404-05 (1970); *Hagans*, 415 U.S. at 545; *Carnegie-Mellon*, 484 U.S. at 350; *see, e.g., Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990); *Blau Plumbing Inc. v. S.O.S. Fix-It, Inc.*, 781 F.2d 604 (7th Cir. 1986); *Dezell*, 796 F.2d 324; *Shaffer*, 730 F.2d 910.

Contrary to Newport's claim that the Fifth Circuit "stands alone" by finding that the district court abused its discretion, the Fifth Circuit properly engaged in its appellate function, reviewed the district court's exercise of its discretion and found that the specific facts of this case weighed so strongly in favor of the exercise of pendent jurisdiction that it was an abuse of discretion to decline it. No new bright line rule was enunciated; the Fifth Circuit correctly undertook the fact-specific analysis that pendent jurisdiction requires. The Fifth Circuit weighed the "commonsense policy of pendent jurisdiction—the conservation of judicial energy and the avoidance of multiplicity of litigation", *Rosado*, 397 U.S. at 405, against the "unique circumstances of this case," *Raucci v. Town of Rotterdam*, 902 F.2d 1050, 1055 (2d Cir. 1990), and found that pendent jurisdiction should have been exercised.

Newport improperly posits the principles of pendent jurisdiction as inflexible and mandatory rules, engaging in the "conceptual approach" this Court cautioned against in *Rosado*, 397 U.S. at 405.[6] Newport also ignores the numerous decisions of various circuits that have found that district courts had abused their dis-

[6] Indeed, in seeking reversal of the Fifth Circuit, Newport wants this Court either to impose a *per se* rule that pendent jurisdiction shall not be exercised whenever all federal claims have been disposed of prior to trial, or to re-weigh the specific facts and circumstances in this case. The former is clearly improper under *Gibbs* and *Carnegie-Mellon*, whereas the latter would be a waste of this Court's resources.

cretion in not exercising pendent jurisdiction, *see, e.g.*, *Caserta v. Village of Dickinson*, 672 F.2d 431, 433 (5th Cir. 1982) (district court abused its discretion by dismissing "extensively litigated and briefed" state law claims after trial on federal claims); *Brown v. Knox*, 547 F.2d 900, 903 (5th Cir. 1977), *cert. denied sub nom. Knox v. Brown*, 432 U.S. 906 (1977) (district court abused its discretion by dismissing "not particularly complex" state law claims); *Sparks v. Hershey*, 661 F.2d 30, 33 (3d Cir. 1981) (district court misused discretion to dismiss pendent claims without "persuasive, reasoned elaboration"); *Knuth v. Erie-Crawford Dairy Cooperative Association*, 395 F.2d 420, 427 (3d Cir. 1968) (district court "lacked an acceptable basis for exercising its discretion" to not retain pendent jurisdiction despite an "insubstantial" federal claim); and *Cooley v. Pennsylvania Housing Finance Agency*, 830 F.2d 469, 476 (3d Cir. 1987) (abuse to dismiss time-barred state law claims where plaintiff initially chose state forum, but claims were removed).

Besides ignoring the inherent "flexibility" of pendent jurisdiction, as this Court pointed out in *Carnegie-Mellon*, 484 U.S. at 350, Newport attempts to create a conflict where none exists by overstating the holding of *Rice v. Branigar Organization, Inc.*, 922 F.2d 788 (11th Cir. 1991). In *Rice*, the Eleventh Circuit summarily found the district court had not abused its discretion by dismissing state law claims after granting summary judgment on the federal claims. 922 F.2d at 792. The *Rice* court did not discuss the *Gibbs* factors of judicial economy, convenience, or fairness to the litigants, but merely noted the discretionary nature of pendent jurisdiction, made the gratuitous observation that discretion could be abused "under these circumstances only by dismissing the pendent claims when no state forum is available," and held there was no abuse of discretion. *Id.* The dictum that discretion could "only" be abused in those circumstances if no state forum was available is attrib-

uted by the court, without any signal, to *Ray v. Tennessee Valley Authority*, 677 F.2d 818 (11th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983). *Rice*, 922 F.2d at 792.

However, *Ray* offers absolutely no support for the dictum in *Rice* and no rational basis appears for its citation as direct authority. *Ray* simply engages in a garden-variety discussion of the elements of pendent jurisdiction, finding no abuse of discretion in the district court's refusal to exercise pendent jurisdiction over a defamation claim by a former TVA employee after granting summary judgment on the ostensible federal claims of breach of employment contract and violation of reemployment rights. 677 F.2d at 825. The *Ray* court does not consider or discuss the availability of a state court and does not even intimate that a district court could "abuse" its discretion only if no state court were available.

Newport's proffered "conflict" is nothing but an unwarranted construction of an unsupported dictum. Indeed, the *Rice* court merely found that in the particular circumstances of that case, no abuse of discretion had occurred; whereas here, the Fifth Circuit found that under the unique circumstances of this case, which are very different from those apparent in *Rice*,[7] an abuse of discretion had occurred. No conflict exists where the courts explore different sides of the same coin.

Newport also makes the misleading statement that "until the ruling here, no circuit court had held that a district court 'must exercise jurisdiction over pendent state claims whenever there have been lengthy pretrial proceedings.' *Danner v. Himmelfarb*, 858 F.2d 515, 524 (9th Cir. 1988), *cert. denied sub nom. Davis v. Himmelfarb*, 490 U.S. 1067 (1989)." Newport's Petition at 9.

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[7] The *Rice* opinion contains no reference to or analysis of the amount of resources of the court and the parties utilized in that case, in stark contrast to the record cited by the Fifth Circuit in the instant case. *Newport*, 941 F.2d at 307-08.

First, the full quote from *Danner* begins, "These cases, however, do not hold that the district court . . ." 858 F.2d at 524. *Danner* does not make the statement Newport forces from it above. Additionally, Newport is also grossly mistaken in alleging that the Fifth Circuit has held here that "*whenever* there have been lengthy pretrial proceedings," a district court must exercise pendent jurisdiction. (Emphasis added.) Newport's Petition at 9. Rather, the Fifth Circuit simply held that here, where "four years of litigation produced 23 volumes and thousands of pages of record, the preparation of a pretrial order exceeding 200 pages, over a hundred depositions, and . . . nearly two hundred thousand pages of discovery production, the declining to hear this case on the eve of trial constituted an abuse of the trial court's discretion." *Newport*, 941 F.2d at 307. The Fifth Circuit has clearly not announced a *per se* rule requiring district courts to exercise pendent jurisdiction every time there are lengthy pretrial procedings.

Newport's citation of cases such as *Berg v. First State Ins. Co.*, 915 F.2d 460 (9th Cir. 1990), and *Lovell Mfg. v. Export-Import Bank*, 843 F.2d 725 (3d Cir. 1988), in which other circuits found no abuse of discretion when a district court declined to exercise pendent jurisdiction even though the parties and court had devoted substantial resources to the case, is beside the point: none of those cases involves facts like those in the instant case. Moreover, as the cases previously cited by Sears demonstrate, there is also case law in which a district court's refusal to exercise pendent jurisdiction *was* held to be an abuse of discretion, underscoring the fact that each case is controlled by its particular facts and circumstances. Even in *Berg* and *Lovell*, the district courts engaged in an application of discretion and the circuit courts reviewed that discretion. Newport's contention that the Fifth Circuit has in effect made the exercise of pendent jurisdiction mandatory is blatantly incorrect

and flatly ignores the review of discretion allowed circuit courts.

CONCLUSION

The Fifth Circuit's finding of an abuse of discretion is plainly warranted by the law of pendent jurisdiction as set forth by this Court and the circuits, and as applied by the Fifth Circuit to the specific facts of this case. Newport is unable to point to any true conflict with other circuits, and therefore in effect seeks to have this Court re-weigh the specific facts that led the Fifth Circuit to conclude that the district court had abused its discretion in declining to exercise pendent jurisdiction in this case. Sears respectfully submits that Newport's petition seeks only to further Newport's attempts at forum shopping and raises no significant legal issues for this Court to decide. The petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-3559

NEWPORT LIMITED, A Partnership in Commendam,
Plaintiff-Appellee-Cross-Appellant.

versus

SEARS, ROEBUCK AND CO.,
Defendant-Appellant-Cross-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

(CA 86 2319 K)

(July 10, 1991)

Before REAVLEY, POLITZ and JOLLY, Circuit Judges.

PER CURIAM: *

Conscious of judicial and legal costs and delays and with due consideration for the interests of justice and

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

judicial economies, state and federal, we render forthwith the following rulings and direct immediate issuance of the mandate:

1. The judgment of the district court rejecting complainant's RICO demand is AFFIRMED; and

2. The judgment of the district court declining to resolve the state law claims is REVERSED and the matter is REMANDED for further proceedings.

The rulings on all other issues raised on appeal are reserved and shall be made when the court assigns its reasons for the foregoing rulings.

AFFIRMED in part: REVERSED in part.